

STATE OF MICHIGAN
COURT OF APPEALS

PATRICK PATTERSON and SUSAN
PATTERSON,

Plaintiffs-Appellants,

v

GREGORY BRYAN CABALA,

Defendant-Appellee,

and

ROBERT TREVINO,

Defendant/Cross-Defendant-
Appellee,

and

SAGINAW CHIPPEWA INDIAN TRIBE OF
MICHIGAN, d/b/a SOARING EAGLE CASINO,

Defendant/Cross-Plaintiff-Appellee.

PATRICK PATTERSON and SUSAN
PATTERSON,

Plaintiffs-Appellants,

v

GREGORY BRYAN CABALA,

Defendant,

and

ROBERT TREVINO,

UNPUBLISHED

August 8, 2006

No. 260728

Bay Circuit Court

LC No. 04-003358-NS

No. 265672

Bay Circuit Court

LC No. 04-003358-NS

Defendant/Cross-Defendant-
Appellee,

and

SAGINAW CHIPPEWA INDIAN TRIBE OF
MICHIGAN, d/b/a SOARING EAGLE CASINO,

Defendant/Cross-Plaintiff-Appellee.

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

In this dramshop action, plaintiffs Patrick and Susan Patterson appeal by leave granted from an order granting summary disposition in favor of defendant Saginaw Chippewa Indian Tribe of Michigan (Tribe) in Docket No. 260728. In Docket No. 265672, plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant Robert Trevino pursuant to MCR 2.116(C)(10). This court consolidated the two appeals. In both cases, we affirm the trial court's granting of summary disposition.

On June 9, 2002, plaintiff Patrick Patterson (plaintiff) was working as a road patrol deputy with the Bay County Sheriff's Department. According to plaintiff, at approximately 2:30 a.m., he was dispatched to investigate a motor vehicle that was driving erratically and which he subsequently discovered had crashed while on the ramp connecting US 10 and northbound I-75. Trevino, the driver of the vehicle, was arrested after he failed a field sobriety exam and registered a .177 on a preliminary breathalyzer test. Trevino admitted that he consumed six to eight beers at "the casino." A wrecker was dispatched to the scene and removed Trevino's vehicle from a ditch near the ramp. While plaintiff was inspecting the damage to Trevino's vehicle, another vehicle, which was being driven by defendant Cabala, struck Trevino's vehicle and pinned plaintiff between Trevino's damaged vehicle and the wrecker. Like Trevino, Cabala was also driving while under the influence of alcohol. Plaintiff sustained severe injuries as a result of being pinned between Trevino's vehicle and the wrecker.

Plaintiffs brought suit against defendants. Defendant Tribe filed a cross-complaint against Trevino asserting that he was required to indemnify them for any damages. Defendant Tribe also moved for summary disposition pursuant to MCR 2.116(C)(1), (4), (7), and (8), asserting that plaintiffs' action was barred by the doctrine of sovereign immunity, that the court lacked personal jurisdiction over the Tribe, that federal law preempts state law regarding Native American affairs, and that the court lacked subject matter jurisdiction. Plaintiffs asserted that a Native American tribe's right to sovereign immunity does not extend to matters involving alcohol, but that, even if it did, the Tribe had waived sovereign immunity in the compact it signed with Michigan providing for the establishment of a class three gaming venue. The trial court granted summary disposition in favor of the Tribe, holding that defendant Tribe had sovereign immunity in a dramshop action and that immunity had not been clearly waived in the compact. The trial court denied a subsequent motion for reconsideration. Plaintiffs filed a claim of appeal from the trial court's granting of summary disposition in favor of defendant Tribe on

November 29, 2004 (Docket No. 260728). This Court originally dismissed the appeal for lack of jurisdiction, but subsequently granted a delayed application for leave to appeal.

Defendant Trevino also moved for summary disposition. Trevino moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiffs could not establish that Trevino was the proximate cause of their injuries because the second accident was a superseding cause that was unforeseeable and that therefore removed Trevino from liability. In support of their cause of action against Trevino, plaintiffs submitted the affidavit of Milwaukee County Sheriff's Department Captain Peter Jaskulski regarding the foreseeability of the second accident.¹

The trial court determined that Cabala's actions were not reasonably foreseeable and granted Trevino's motion for summary disposition under MCR 2.116(C)(10). In making its ruling, the trial court stated:

The question then becomes: Is the intervening act reasonably foreseeable? There is the affidavit that suggest this happens quite frequently and it's--it's a risk that, ah, I should say—it's a—an event that happens to police officers unfortunately more frequently than one would—one would want to have happen. The question is, is what—what Trevino actions were there that would not cause this to be an intervening cause and/or reasonably foreseeable? Trevino was in custody at the time. He couldn't do anything about it. I suppose one could make

¹ In his affidavit, Jaskulski made the following statements regarding the foreseeability of the second accident:

h. One of the greatest known hazards associated with any patrol stop, accident investigation or directing traffic associated with a motor vehicle crash is that a police officer may be struck by another motorist.

i. In instruction of police officers, they are trained in measures to undertake to reduce the foreseeable risk associated with being struck by a third party while performing a patrol stop, accident investigation or directing traffic, but even with the safety precautions undertaken, it is impossible to eliminate this foreseeable risk of a subsequent collision.

j. It is my opinion that a motorist who voluntarily consumes alcohol and then operates his vehicle while intoxicated reasonably should have known that he has created a condition wherein he would endanger third parties or necessitate police intervention.

k. That Robert Trevino's conduct set into action a course of events which were a direct cause of Deputy Patterson's injuries.

l. That the secondary accident involving Cabala's collision with Trevino's accident was reasonably foreseeable and the natural consequence of Trevino's illegal and grossly negligent conduct.

an argument that if the investigating officer inadvertently stepped into the highway and got ran over by someone who was lawfully driving that would be a—that Trevino would still be liable. You could go on and on and on and on with hypothetical[s] that would—would cause perhaps injury that the—because of whatever reason this accident may have caused those injuries. The law isn’t that way. The law is such that it must be some intervening—or I should say one cause that is reasonably foreseeable in light of this intervening cause. I don’t see it. I don’t think this is reasonably foreseeable under the law or under the facts of this case as a—as I would apply it to the law. I’ll grant the motion under (C)(10).

We first address plaintiffs’ appeal in Docket No. 265672 from the trial court’s granting of summary disposition in favor of defendant Trevino. The issue is whether defendant Cabala’s conduct of driving while under the influence of alcohol and causing the second accident which resulted in plaintiff’s injuries constituted a superseding cause which relieved Trevino of liability. Plaintiffs contend that the trial court confused the concepts of superseding intervening negligence and concurrent negligence in reaching its decision by focusing on the fact that Trevino was in custody when plaintiff was struck. Plaintiffs assert that the trial court should have focused on whether the second act of negligence was foreseeable at the time of the first act of negligence. According to plaintiffs, the second accident was foreseeable because it is not uncommon for traffic accidents to occur at the location of a highway traffic stop, and summary disposition was therefore inappropriate. In contrast, Trevino and the Tribe both contend that the second accident was not foreseeable.²

Plaintiffs’ complaint alleged that Trevino was negligent or grossly negligent. Proof of proximate cause is necessary to sustain a claim of negligence. *Eichhorn v Lamphere School Dist*, 166 Mich App 527, 545; 421 NW2d 230 (1988). Proximate cause is “that which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury,

² We review de novo a trial court’s grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm’rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court “must consider the documentary evidence presented to the trial court ‘in the light most favorable to the nonmoving party.’” *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) “if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.” *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

without which such injury would not have occurred” *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985), quoting *Weissert v Escanaba*, 298 Mich 443, 452; 299 NW 139 (1941). However, an act that occurs after the actor’s negligent act was committed, ““which actively operates in producing harm to another[,]” may break the causal chain. *McMillan, supra* at 576, quoting 2 Restatement Torts, § 441, p 465. Such an act will constitute a superseding cause that will relieve the original actor from liability, unless it is found that the intervening act was reasonably foreseeable. *Id.* “Generally, proximate cause is a factual issue to be decided by the trier of fact. However, if reasonable minds could not differ regarding the proximate cause of the plaintiff’s injury, the court should decide the issue as a matter of law.” *Nichols v Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002). The question whether an intervening act constitutes a superseding cause is also generally a question for the finder of fact. *Meek v Dep’t of Transportation*, 240 Mich App 105, 118; 610 NW2d 250 (2000).

Here, Trevino and the Tribe assert that Cabala’s intoxicated driving, which led Cabala to hit the wrecker and caused plaintiff’s injuries, was an intervening act that constituted a superseding cause that was unforeseeable and which broke the causal chain. Our Supreme Court has “often cited with approval the sections of the Restatement dealing with superseding cause.” *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 437 n 8; 487 NW2d 106 (1992), amended 440 Mich 1203 (1992), superseded by statute on other grounds as stated in *Lamp v Reynolds*, 249 Mich App 591, 604; 645 NW2d 311 (2002). The Restatement (Second) of Torts sets forth the considerations that are important in determining whether an intervening force constitutes a superseding cause. It states:

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor’s negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor’s negligence, or, on the other hand, is or is not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person’s act or his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion. [2 Restatement Torts, 2d, § 442, p 467.]

Here, the intervening force, i.e., the second accident, was clearly due to the independent actions of a highly culpable third person, Cabala, whose action of driving his vehicle while under the influence of liquor was wrongful and subjected him to liability. Moreover, the second

accident, which occurred because defendant Cabala was driving while under the influence of alcohol, was extraordinary and unusual.³ Therefore, applying the factors listed in the Restatement to the facts of this case, we conclude that the second accident was a superseding cause of plaintiffs' injuries thus relieving Trevino from liability. 2 Restatement Torts, 2d, § 442, p 467; see *Hayward v PDA, Inc*, 573 NW2d 29 (Iowa, 1997) (concluding that a dramshop's act of serving alcohol to an intoxicated patron was not a proximate cause of a police officer's death, where the officer was killed by a second intoxicated driver while investigating an accident caused by the dramshop's patron because the second driver's actions constituted a superseding cause).

Plaintiffs rely on *Davis v Thorton*, 384 Mich 138; 180 NW2d 11 (1970), in support of their contention that summary disposition was inappropriate in this case. In *Davis*, the defendant parked a vehicle and left his keys in the ignition without locking the doors. *Id.* at 141. Thereafter, a group of minors took the vehicle for a "joyride" and caused a serious accident. *Id.* Our Supreme Court, looking at the totality of the circumstances and noting that a city ordinance forbade the defendant's actions, held that "reasonable men might have concluded that leaving the keys in the ignition under these circumstances was not too remote a cause of the plaintiff's injuries and that the joyrider's intervention did not sever that causal connection." *Id.* at 149. Plaintiffs contend that *Davis* supports the proposition that simply because the intervening actor's actions, i.e., Cabala's actions, were also negligent, that does not mean that the intervening act was a superseding cause. *Id.*; see also 2 Restatement Torts, 2d, § 447, p 478. Plaintiffs therefore assert that Trevino can be held responsible for plaintiff's injuries despite Cabala's actions. They maintain that Trevino should have realized that other negligent drivers might injure those who would stop at the scene of an accident.

We are not persuaded by plaintiffs' reliance on *Davis*. While Trevino's actions were the reason plaintiff was dispatched to the scene, there are other factors which caused Trevino to be in the exact place where the injuries occurred and which prevent Trevino from being a proximate cause of plaintiff's injuries. For example, it may be that the operator of the wrecker placed Trevino's vehicle in a manner which would create a greater risk of harm to plaintiff. We agree with plaintiffs' assertion that the fact that a third person's intervening act is negligent does not necessarily make it a superseding cause of harm to another. However, in this case, the second accident was clearly due to the independent actions of a highly culpable third person, Cabala, whose action of driving his vehicle while under the influence of liquor was wrongful, extraordinary, and unusual. Therefore, for the reasons we articulated above based on the factors outlined in 2 Restatement Torts, 2d, § 442, p 467, we hold that Cabala's operation of a motor vehicle while intoxicated resulted in the second accident in which Cabala's vehicle struck Trevino's vehicle and pinned plaintiff between Trevino's vehicle and the wrecker and constituted

³ We observe that the Jaskulski's affidavit suggested merely a general likelihood of injuries to police officers when they are investigating accident scenes. However, this "general likelihood" evidence was insufficient to establish foreseeability as a matter of law and fails to establish that Trevino owed "plaintiffs a duty to protect them from the unusual chain of events that led to their injury." *Brown v Michigan Bell Telephone, Inc*, 459 Mich 874, 874-875; 585 NW2d 302 (1998).

an independent superseding cause of plaintiff's injury that was not foreseeable. Thus, the second accident prevents Trevino from being held responsible for plaintiffs' injuries.⁴ Therefore, applying the factors outlined in 2 Restatement Torts, 2d, § 442, p 467 to the facts of this case, we conclude that reasonable minds cannot differ regarding the conclusion that Cabala's action's constituted a superseding cause which severed the causal connection between plaintiffs' injuries and Trevino's actions.

We agree with plaintiffs that the trial court placed too much emphasis on the fact that Trevino was already in custody when the second accident occurred. Whether Trevino was in custody at the time of the second accident has little, if any, bearing on whether Trevino's actions constituted a proximate cause of plaintiffs' injuries. However, "this Court will not reverse where the trial court reached the right result for the wrong reason." *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Finally, we conclude that the trial court also properly granted summary disposition in favor of defendant Tribe. The dramshop act, MCL 436.1801(3), provides that individuals who suffer damages as a result of the sale of alcohol to a visibly intoxicated person have a right of action against the person who furnished alcohol to the visibly intoxicated person "if the unlawful sale is proven to be a proximate cause of the damage[.]" Based on this statutory language, because proximate cause cannot be established against Trevino proximate cause cannot be established against the Tribe. Accordingly, we affirm the trial court's grant of summary disposition in favor of the Tribe.

Our resolution of the proximate cause issue in Docket No. 265672, makes it unnecessary to address plaintiffs' arguments regarding sovereign immunity in Docket No. 260728, and thus we decline to do so.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder

⁴ While legal precedents direct our decision in this case, we are sympathetic to the plight of police officers dispatched in the dark of night to work alongside dangerous roadways. We do note that plaintiff police officer is not without other remedies in this matter, be they against Cabala or through his collective bargaining agreement or workers' compensation.